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Title: At the limits of Cultural Heritage Rights? The Glasgow Bajuni Campaign and the UK Immigration System: A Case Study.

Abstract: In 2003, the Convention for the Safeguarding of Intangible Cultural Heritage formalised provision for forms of heritage not solely rooted in the material world. This expanded the scope and accessibility of cultural heritage rights for communities and groups. To much commentary and critique, the UK has infamously not ratified the 2003 ICH Convention. This paper examines the implications of the UK's decision not to ratify the Convention for the cultural heritage and human rights of a minority, asylum-seeking group in Glasgow, Scotland. Based on participatory ethnographic fieldwork with the group and analysis of their asylum cases, it makes two observations: first, that the UK's absence from the Convention establishes a precedent in which other state actors (i.e. immigration authorities) are emboldened to advance scepticism over matters involving Intangible Cultural Heritage; second, that despite this, limitations in current provisions in the 2003 ICH Convention would provide the group with little additional protection than they currently have. Developing these observations, we critique current UK approaches to ICH as complicit in the maintenance of hierarchies and the border. Finally, we consider the extent to which the current provisions of the 2003 ICH Convention might be improved to include migrant and asylum-seeking groups.

At the limits of Cultural Heritage Rights? The Glasgow Bajuni Campaign and the UK Immigration System: A Case Study

In recent decades, the relationship between cultural heritage and human rights has become a focus of discussion. Scholars have increasingly recognised a person's access to cultural heritage as a fundamental right¹, and noted that cultural heritage is often connected to a person's right to broader social expression, and other human rights.² This growing recognition of the links between cultural heritage rights and human rights has contributed to and extended into discussions about the status of intangible cultural heritage (ICH). Intangible cultural heritage was formally recognised in the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.³ Though the Convention is not without problems, it provided the first instance of formal recognition to forms of heritage that were not solely rooted in the material world (the built environment, material artefacts and so on). By expanding the scope of heritage to include intangible forms of cultural expression, the 2003 Convention redefined heritage as something that was living, practiced and elastic.⁴ For the first time, communities whose heritage largely manifested in intangible rather than tangible forms of expression had specific and formalised access to UNESCO's protections. Though the state nonetheless remained involved in nominating a community's ICH for protection, this nonetheless meant that UNESCO provisions were a little more accessible for minority communities and groups.⁵

The UK has rather infamously not ratified the 2003 ICH Convention. The UK Government have sought to justify this decision on the basis that ICH is given provision in

¹ Logan, Langfield and Nic Craith 2010, Shaheed 2011, Silverman and Ruggles 2007.

² UNESCO 2005

³ UNESCO 2003a

⁴ CESCR 2009, Art. 11

⁵ Albeit with some limitations – see Logan, below

other instruments to which it is a signatory.⁶ However, Smith et al. have suggested the UK's reluctance to ratify the Convention instead must be understood in the context of the UK's dominant heritage discourse, which continues to emphasise heritage in tangible, fixed terms.⁷ The lack of a UK signature to the Convention has prompted concern amongst community groups and advocates, who fear that their particular expressions of ICH will suffer from a lack of specialised protection.⁸ However, others have suggested that minority and vulnerable populations might in fact encounter some benefits of remaining outside the Convention. For instance, Logan suggests that ratification of the Convention by the state has the potential to place minority groups in vulnerable positions, especially in cases where communities are not really involved in the prior process of assessment, or in cases where 'authorised discourses'⁹ occlude the approaches to minority groups to ICH. These cases, Hall notes, 'are always inflected by the power and authority of those who have colonised the past, whose versions of history matter'.¹⁰ In instruments such as the 2003 Convention, in which the state has final responsibility for submitting nomination dossiers,¹¹ there is therefore potential for the cultural heritage and human rights of minority groups to be subordinated to the priorities of the state.¹²

Since the UK has continued to decline to sign the 2003 Convention, in the main, discussions about the potentials and pitfalls of the UK's (non)ratification of the Convention have remained literally and figuratively academic. Interactions between cultural heritage rights and human rights and between rights to ICH and the 2003 ICH Convention are complex, messy and have multiple possible outcomes for future ICH provisions, for the state and for the communities within it. A better understanding of the full implications – and multiple possible

⁶ Smith et al 2008, see also Hassard 2009

⁷ Smith and Waterton 2009, page 297

⁸ Howell 2008

⁹ Smith 2006

¹⁰ Hall 2005, 6

¹¹ Kuutma 2013

¹² Harrison 2013, 136

outcomes – of the UK’s stance both on the 2003 Convention and on its relationship to human rights is therefore overdue. Moreover, we would suggest, analysis of this relationship must be grounded in the empirical experiences of groups and communities living with the outcomes of the current situation in the UK.

We do this in the context of the experiences of the Glasgow Bajuni Campaign. The experiences of the campaigners have been gathered over two years of ethnographic participatory research¹³ in Glasgow. Based in Glasgow, Scotland (UK), the Glasgow Bajuni Campaign ran between 2013 and 2015, and was a grassroots campaign that protested the experiences of a small group of Somali Bajuni people seeking asylum in the UK. The asylum applications of all the seven members of the campaign group had all been repeatedly refused by UK immigration authorities. The campaigners’¹⁴ cases had been built – and rejected – on iterations of their intangible cultural heritage, including their knowledge of Bajuni cultural practices, and their abilities in Bajuni languages. Following the refusal of their asylum applications, the campaigners have faced prolonged destitution, and possible detention and deportation. Considered in terms of cultural and human rights, the Glasgow Bajuni campaigners’ cases raises a number of complexities. First, the centrality of language to the Bajuni campaigners’ cases is an issue of some controversy, not only within the context of their asylum applications,¹⁵ but also for its status as an instance of intangible cultural heritage.¹⁶

¹³ Fieldwork was conducted in Glasgow between January 2014 and December 2015. It combined ethnographic ontologies with participatory research methods (Phipps 2013). E. Hill assisted the group with their campaigning work and provided administrative, research and social support to campaign members. Due to the sensitivity of the campaigners’ cases, no formal interviews were recorded, but their comments and perspectives were noted as part of the long-term participant observation that accompanied the participatory research.

¹⁴ All names included in this paper were changed to protect the identity of informants.

¹⁵ In the UK, the testing of language to determine a person’s country of origin is regarded as a controversial and flawed process (see discussion below).

¹⁶ Nic Craith 2008. The status of language as part of a community’s intangible cultural heritage remains contested and unrecognised (see discussion below).

Secondly, the location of the campaigners' cases within UK asylum infrastructure places questions about cultural heritage rights with fundamental human rights. Under the 1948 Declaration of Human Rights, the act of seeking asylum is identified as a fundamental human right.¹⁷ This right is further enshrined by the 1951 UN Convention for Refugees.¹⁸ In these circumstances, there is an argument to be made that by dismissing the intangible cultural heritages (their linguistic and cultural practices) upon which the Bajuni campaigners' cases are built, UK Immigration authorities are placing their fundamental human right to seek asylum and freedom from persecution at risk. Furthermore, one might argue, if this human right is placed at risk, so too are the campaigners' cultural heritage rights.¹⁹ One might also ask whether the Immigration authorities' dismissal of the campaigners' intangible cultural heritages is informed by a scepticism towards ICH and cultural heritage rights.

A key question here is therefore: to what extent does the UK Government's refusal to ratify the 2003 ICH Convention impact the Glasgow Bajuni campaigners' asylum cases? Is the denial of both their asylum applications and their ICH because ICH does not have the protection of the 2003 Convention? Or, is the reverse in fact the case: does the UK's status outside the Convention not have an impact upon matters of ICH? These questions are evidently of relevance in the specifics of the UK context; however, because they interrogate the effectiveness of the Convention, they also have a wider scope. There are also questions raised by the Bajuni campaigners' cases about the extent to which migrants – and especially asylum seekers, who are at the margins of the state – are given provision and protection in current cultural heritage instruments.

¹⁷ UNHCR ([1948] 2017)

¹⁸ UNHCR 1951, Art. 1

¹⁹ As, if their asylum claims are not accepted, they are at risk of being returned to a country in which they will be at risk if they practice their cultural heritage.

We address these questions throughout this paper. To begin, we first review existing discussions about the relationship between cultural heritage and human rights. In the second part of the paper, we discuss the details of the Bajuni campaigners' cases; in the final section of the paper, we evaluate the extent to which ICH provisions are of benefit or are of detriment to the campaigners' situation. We conclude with observations about the current limitations and potentials of contemporary ICH instruments.

Cultural Heritage and Human Rights

Despite receiving increased attention in recent years,²⁰ the relationship between cultural heritage and human rights – and more specifically, the provision made for this relationship – remains on rather uncertain ground. Overt attempts to discuss cultural heritage within UN human rights instruments have not been forthcoming, to the extent that Lixinski has noted a degree of reticence on the part of the UN to incorporate the former into the latter.²¹ The presence of heritage in human rights legislation is scant, limited to Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)²² and the Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which recognises the rights of minorities to 'enjoy their own culture, to profess and practise their own religion, or to use their own language'²³. However, despite these initial provisions, cultural heritage rights have received insufficient consideration in human rights instruments. Labadi has suggested that whilst cultural heritage rights are considered problematic in a human rights context, they also remain under-problematised²⁴. Certainly, the issue is not one with an easy resolution –

²⁰ Logan, Langfield and Nic Craith 2010, Shaheed 2011, Silverman and Ruggles 2007.

²¹ Lixinski 2013

²² Which states that everyone should have the right to participate in cultural life, OHCHR 1966a

²³ OHCHR 1966b, Art. 27

²⁴ Labadi 2010

for, as Logan observes, discussions both of heritage and of human rights in a global context must take into account a plethora of distinct national, cultural or political approaches to the topics, as well as remaining aware of national and global hierarchies of power involved in any potential mobilisations.²⁵ In this context, Donders observes, issues arise because ‘states do not always agree whether cultural rights are substantive human rights or more policy-oriented human rights that do not impose direct, definite obligations’²⁶.

In noticeable contrast to the (under)provision for heritage rights in human rights instruments, cultural heritage legislation has given human rights some provision. Though older instruments such as the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972)²⁷ initially established a weak link with human rights²⁸, the relationship has since been reconsidered and partially readdressed. The Special Rapporteur in the field of cultural rights, Farida Shaheed, considers cultural heritage rights as fundamental human rights,²⁹ noting that, ‘considering access to and enjoyment of cultural heritage as a human right is a necessary and complementary approach to the preservation/safeguard of cultural heritage’³⁰. The 2005 Framework Convention on the Value of Cultural Heritage for Society (also known as Faro Convention) echoes Shaheed's comments:

every person has a right to engage with the cultural heritage of their choice, while respecting the rights and freedoms of others, as an aspect of the right freely to participate in cultural life enshrined in the United Nations Universal Declaration of

²⁵ Logan 2009

²⁶ Donders 2010, 32

²⁷ UNESCO 1972

²⁸ Logan 2008

²⁹ Shaheed 2011

³⁰ Donders 2010, 32

Human Rights (1948) and guaranteed by the International Covenant on Economic, Social and Cultural Rights (1966) ³¹

The Convention makes explicit reference to its commitment to human rights, stating:³²

No provision of this Convention shall be interpreted so as to:

- a. limit or undermine the human rights and fundamental freedoms which may be safeguarded by international instruments, in particular, the Universal Declaration of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms;

However, though the Convention's explicit link between cultural heritage provision and human rights is to be welcomed, it must also be questioned whether the provision goes far enough. Further additions to Article 6 clarify the Convention's position and note that implementations of its provisions should not:

- b. affect more favourable provisions concerning cultural heritage and environment contained in other national or international legal instruments;
- c. create enforceable rights.³³

Though the Faro Convention's stated commitment to the relationship between human and heritage rights is a step in the right direction on paper, in practice, its ambitions remain rather hollow, not only unenforceable, but also subordinated to pre-existing treaties and instruments

³¹ Council of Europe 2005, preamble

³² Council of Europe 2005, Article 6

³³ Ibid.

that have lesser human rights provisions. While within this framework there is more leeway for unofficial expressions of heritage such as those of minorities, its remit is curtailed by its regional emphasis, and to advance rights, further development of international standards is needed.

Whilst the Faro Convention leaves considerable work to be done of cementing the relationship between cultural heritage and human rights, it is nonetheless of note for its innovative and expansive use of the concept of heritage,³⁴ which places emphases on cultural heritage as defined by ‘no inherent time limits, nor limits of form and manifestation.’³⁵ In this context, it has had some success in making provision for forms of cultural heritage outwith established definitions, which in the past have focussed on an understanding of heritage as embodied in items, identified by experts rather than people of the community, arranged in a global hierarchy of value based on assigned ‘outstanding universal value’.³⁶ The Convention follows moves by UNESCO to open its definition of heritage, moving from materiality to a processual understanding that incorporates intangibility as well³⁷. UNESCO’s work has been embodied in instruments such as the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005),³⁸ and the Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention)³⁹. The ICH Convention espouses a definition of cultural heritage that emphasises practiced, lived and living understandings, that include:

³⁴ Jokilehto 2012, 227

³⁵ Fairclough 2009, 37

³⁶ See, for instance, the Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972

³⁷ Bortolotto 2006, 2007

³⁸ UNESCO 2005

³⁹ UNESCO 2003a

intangible cultural heritage, [which is] transmitted from generation to generation, [and] is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.⁴⁰

The Convention also takes care to note the relationship between ICH and human rights:

For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.⁴¹

The ICH Convention's dual emphasis upon international human rights legislation *and* the requirements of communities and groups recognises the relationship between ICH and human rights as an issue that is both locally and (inter)nationally constituted, and requires human rights legislators to work with specific cultural, social and political approaches to rights espoused by communities and groups. The emphasis on the perspectives of communities and groups is important because it challenges normative approaches (such as those noted in the Faro Convention above) which placed the requirements of international legislation above the local practices of communities and groups. The increased focus on the requirements of communities and groups might be read alongside later provisions made for minority and indigenous peoples, such as the 61/295 United Nations Declaration on the Rights of Indigenous

⁴⁰ UNESCO 2003a, Article 2

⁴¹ Ibid.

Peoples, which notes that, ‘indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions’⁴², or the recent OAS Declaration on the Rights of Indigenous Peoples⁴³ that in many ways pushes the UNDRIP provisions on heritage to a whole new level. These approaches begin to embed indigenous and minority forms of knowledge and heritage into rights-based frameworks. Former Special Rapporteur of the Economic and Social Council, Protection of the Heritage of Indigenous Peoples, Erica Daes, comments, ‘such legal reforms are vital to a fair and legal order because indigenous peoples cannot survive or exercise their fundamental human rights as distinct nations, societies and peoples without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors’.⁴⁴

It is important to note that though the 2003 ICH Convention precludes a move towards these more recent attempts to connect on minority and indigenous heritages with a rights-based context, it does not pursue the matter to the same extent as the OAS Declaration. Perhaps as a result, the ICH Convention continued to omit elements of ICH that were of key importance to local groups and communities from its provisions. Language is an example of one such exclusion. Although language is included within the ICH Convention, Article 2a refers to language simply as ‘a vehicle of the intangible cultural heritage’⁴⁵. The neglect of language as an explicit dimension of heritage has been raised as problematic by some absentees from the Convention⁴⁶. We argue that this demotes the status of language to ‘a vehicle of transmission rather than a dimension of heritage to be valued in and of itself’⁴⁷. As we note elsewhere,⁴⁸

⁴² UNHR 2007, Art. 31

⁴³ OAS 2016

⁴⁴ Daes 1993, 13

⁴⁵ UNESCO 2003a, Art. 2a

⁴⁶ see Nic Craith, Kockel and Lloyd forthcoming, Sullivan 2012, African Union 2006, Preamble

⁴⁷ Nic Craith 2008, page 57.

⁴⁸ Nic Craith and Hill 2015

and is apparent in the Bajuni campaigners' cases below, if robust enforcement of human rights provisions is lacking for matters of both tangible and intangible cultural heritage, this is especially the case for cultural practices, such as language, which are so far unrecognised as ICH. This 'backdooring'⁴⁹ of language in such important instruments has significant consequences for minorities.

The UK and the Convention for the Safeguarding of ICH

The UK context in which the case study of this article is set provides additional complications to an already complex dynamic between human and cultural heritage rights. The UK has signed and ratified both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. These documents include provisions related to participation in cultural life, broadly discussed, that include the right of minorities to 'enjoy their own culture, to profess and practise their own religion, or to use their own language'.⁵⁰ However, despite its close involvement in the development of other UNESCO instruments, the UK has not ratified the 2003 Convention for the Safeguarding of ICH. Ostensibly, the UK government has argued against ratifying the ICH Convention on the basis that it considers that provisions for intangible cultural heritage are covered by the broad references to cultural heritage in earlier instruments. Smith and Waterton suggest otherwise.⁵¹ They argue that the UK refuses to ratify the ICH Convention because it presents a view of heritage that is in conflict with normative UK heritage precedents, that sees heritage as 'in the past and an end product in itself'.⁵² As a result, they suggest approaches to heritage in the UK have 'started to stagnate around a view of identifying national importance, establishing

⁴⁹ Lixinski 2013, 162

⁵⁰ OHCHR. 1966b, Art. 27.

⁵¹ Smith and Waterton 2009

⁵² Orr 2011, 50

objective and immutable value of aesthetics and authenticity'.⁵³ The UK is not the only nation-state not to have ratified the treaty: Kurin notes that 'several nations with a history tied to the UK – the US, Canada, Australia and New Zealand – have not signed on', because of 'how the Convention might affected historic and legally complex relationships with their native populations'.⁵⁴ To what extent might the UK's approach to minority groups also factor into the decision not to ratify the 2003 ICH Convention? To what extent does it find the Convention's emphasis on the requirements of minority groups and communities problematic?

In the more general context of the relationship between human and heritage rights, and in the specific immigration context of this paper, the UK's failure to ratify the 2003 ICH Convention raises a number of questions. The first concerns impact, and asks: what are the immediate consequences of the lack of recognition of the 2003 ICH Convention by the UK upon based cases that rely upon iterations of intangible cultural heritage? What about iterations of cultural heritage (such as language) that remain unrecognised even by the ICH Convention? How are the human rights of the individuals involved in these cases impacted? The second raises points about framing and precedent, and asks: to what extent does the UK's rejection of the ICH Convention normalise particular definitions of and approaches to cultural heritage? How does this precedent influence other state actors involved in the evaluation of cultural heritage? The third considers this question of impact outwith this specific case, and casts a critical eye over the potential of the ICH Convention to impact human rights. It asks, to what extent do such cases suffer from the UK having not ratified the Convention? Or, following Logan's point that state ratification of the ICH Convention can impede rather than increase minority groups' access to human rights,⁵⁵ to what extent might they benefit from it? To answer these broader questions, we first turn to the specifics of our case study.

⁵³ Orr 2011, page 50 comments on Smith and Waterton 2009

⁵⁴ Stefano 2016, page 41, interviews Kurin.

⁵⁵ Logan 2009

Case-Study: the Glasgow Bajuni Campaign

The Glasgow Bajuni Campaign began in the autumn of 2013. Formed as a last resort for its near-destitute members, it sought to raise awareness of the significant difficulties a small group of campaigners were encountering with their asylum applications to the UK. The campaigners were all members of the Bajuni clan, a minority clan from the southern regions of Somalia, who have encountered considerable persecution due to their minority status. On account of this persecution, many from the clan have fled Somalia and sought refuge in countries around the world. On claiming asylum in the UK throughout the mid 2000s and early 2010s, and on account also of their minority status, they faced particular forms of linguistic and cultural 'testing' to determine their nationality, a form of testing that had been approved by the UK Home Office since 2004.⁵⁶ The following section gives some cultural and historical context to the Bajuni's situation, before tracing the ways in which their cultural and linguistic heritage is problematised in a rights-based context.

Who are the Bajuni people?

Following unrest in Somalia from 1969, the outbreak of civil war in 1991, and after decades of continuing conflict, Bajuni people have been displaced all over the world.⁵⁷ However, those remaining in Somalia live on the coast of the Jubba Hoose region, in the Bajuni-founded port city of Kismayo and on the Bajuni Islands archipelago. Due to the geography of the islands across the Somali/Kenyan border, a subclan of the Bajuni people also live in Kenya. The term 'Bajuni' is used to describe a person's overall membership in the Bajuni 'tribe', which itself is

⁵⁶ Patrick 2014

⁵⁷ Besteman 2012

broken into eighteen smaller 'clans'⁵⁸. Bajuni people have traditionally made their living by way of the sea –through fishing, trade or seamanship ---- or by cultivating land on the coast of mainland.⁵⁹ Traditionally, the Bajuni people have spoken Kibajuni, a language related to but distinct from Swahili. In more recent years, due to trade, travel and displacement, Swahili and some Somali has also become more common.⁶⁰

In Somalia, the Bajuni have encountered persecution on multiple counts.⁶¹ In addition, though it is not the only factor in their ongoing oppression, and should not be viewed in isolation⁶², the Bajuni's clan identity and relationship to the wider Somali clan system has been influential in their persecution. In the wider Somali context, clan provides a structure of social stratification. Based on long paternal lineages, the clan system stratifies Somali people into majority and minority clans and subclans. The social status of a clan is informed by a number of elements. Somali origin narratives confer clan status and social belonging based on their perceived proximity to Arab ethnicity and Islam.⁶³ Territorial and lifestyle associations further determine status, with the (northern) territories and (nomadic) lifestyles of those with most status given precedence.⁶⁴ Based on these categories, clans are organised into an (ever-evolving) hierarchy, which is bound by a common ancestry. The Bajuni people are not located in this clan hierarchy. Descended from a mix of African, Arab and Portuguese origins, their ancestry is associated not with the Somali lineage system⁶⁵, but with the peoples that

⁵⁸ Nurse 2013, 15

⁵⁹ Nurse, 2013, 2-3

⁶⁰ Ibid.

⁶¹ Kusow 2004, Eno 2008, Abby 2005

⁶² Kapteijns 2004

⁶³ Kusow 2004, Ahmed 1995, Mire 2016

⁶⁴ Kusow 2004, 3

⁶⁵ Nurse 2013, 23

historically occupied ancient African kingdoms in Central East Africa.⁶⁶ Today, on the basis of their language⁶⁷, they can be associated with Bantu ethnicity.⁶⁸

As a result of their differing lineage and culture, the Bajuni people are widely considered to be outside the dominant Somali clan system, and are often defined as a non-lineal, non-ethnic Somali minority clan. Their non-lineal status can be connected to a long history of enslavement and exploitation by both majority clans and colonial settlers.⁶⁹ Today, they are referred to derogatively as *adoon* (Somali for 'slave') or *tiku* (Swahili for 'slave')⁷⁰, and their non-ethnically 'Somali' origins are racially denigrated.⁷¹ In the onset of the civil war, majority clans sought to recruit Bajuni people to their cause, whilst violently 'clearing' the Bajuni people from their traditional lands.⁷² In the 2000s, as the Somali state collapsed, the extremist group al-Shabaab took over southern Somalia, including the Bajuni territories, and continued the persecution of minority groups. Following decades of violence, ethnic cleansing and enslavement, Nurse comments, 'no one can be sure how many Bajuni remain in Somalia but an informed guesstimate would be at most a few hundred'.⁷³

The Bajuni campaign in Glasgow, UK

The Bajuni Campaigners arrived in the UK in the mid 2000s, and were moved to Glasgow under the government Dispersal Scheme.⁷⁴ UK country guidance recommends that the Somali

⁶⁶ Eno 2008, 138

⁶⁷ Nurse 2013, 37

⁶⁸ Besteman 2012

⁶⁹ Besteman 1999, Kusow 2004, 3, Eno 2008, 140, Nurse 2013, 24

⁷⁰ Bajuni Campaign 2014

⁷¹ Bajuni are referred to as *jareer* - a term which means 'hard textured hair' of people with 'African' features, and is contrasted with *jilec* - the traditional 'soft-textured hair' - of lineal Somalis (Kusow 2004, 4)

⁷² Abby 2005, 14; 40

⁷³ Nurse 2013, 2

⁷⁴ Schuster 2004, Hynes 2011, Zetter et al. 2005

Bajuni be considered for asylum because they are a persecuted minority people⁷⁵ (discussed further below). The Bajuni people's lifestyle on the Bajuni Islands and their often sudden means of departure has meant that many of those seeking asylum in the UK arrive without documentation, which is required by the Home Office to provide evidence of their asylum claim.⁷⁶ As a result, the Home Office often requires them to submit alternative forms of evidence of their place of origin, including undergoing Language Analysis for Determination of Origin (LADO) testing. In the absence of documentation as proof of nationality, LADO is used by a number of countries, including the UK, as one of a number of elements that can determine an asylum seeker's nationality.⁷⁷ Based on guidance from linguistics experts in 2004, LADO works from the premise that through an analysis of a combination of a person's mother tongue, accent and cultural knowledge of language-use, a person's place of origin can be indicated.⁷⁸ For some Bajuni people, LADO testing has led to successful asylum applications in the UK. However (as we discuss further below), the implementation of LADO testing has been found to be inconsistent, and it has also been implicated in cases in which applications are considered to have been wrongly refused.⁷⁹ In all the cases of the Glasgow Bajuni campaigners, it led to their cases being refused on the grounds of 'disputed nationality'. The Glasgow Bajuni campaign began in the autumn of 2013, in reaction to this outcome, the seven members of the campaign (six men and one woman, plus additional supporters) brought together by a local activist who noticed the similarities in their cases. On their blog, the campaigners state their case:

⁷⁵ Home Office 2015, 4

⁷⁶ Griffiths 2012; see Amnesty International 2012

⁷⁷ Craig 2012

⁷⁸ Patrick 2014

⁷⁹ Craig 2012, Amnesty International 2012, Allen 2008

Just because they know that Somalis from mainland do not accept us as people from Somali that's why Home Office doing this to us, treating us like animals in the streets without their owners. You know what... I'm so tired with this kind of life... We are human too just like them, so why they doing this to us? We didn't ask God to make us Bajunis, but we are happy that we are Bajunis, even if we're from minority tribe and small in number but all we ask is to be recognised the way we are and where we are from.⁸⁰

At the time of the campaign's formation, all the campaign members had reached a point in their applications in which they were considered 'appeal rights exhausted'. This meant that they were no longer able to access the basic support systems usually available to people seeking asylum in the UK. As a result, life in Glasgow for the campaigners was increasingly tough. Mohamed wrote a letter to the Home Office to describe the impact of its decision on his everyday life:

It's been 5 months now since Home Office stop supporting me. Since then, I end up being a beggar to the people and different Churches but now I am fed up with this situation. I think it is better for me to be killed by Al-Shabab and those who used to torturing us before, back home there than just staying here and killed softly by hunger in the country which believe itself that have and support Human Rights.⁸¹

Once the Bajuni campaigners had exhausted their appeal rights, they entered an ill-defined area of the UK immigration system. Though they had been refused asylum, the Home Office

⁸⁰ Bajuni Campaign 2014; November 17th 2013

⁸¹ Correspondence to Home Office

seemed to acknowledge that it was unable to ‘return’ them; however it refused to give further consideration to their cases. After the refusals, the campaigners themselves could not return to Somalia as it remained an unsafe environment and were instead caught in a constant administrative process of applying for sufficient support to avoid becoming destitute.

For Mohamed, the Home Office decision against his asylum application impacts every area of his life in the most challenging of ways. From his perspective, he can see the clear links between (the denial of his) Bajuni heritage and the broader spectrum of Human Rights, but he is powerless to make the same links clear to those who have power over his case.

Linguistic and cultural heritage

For the Glasgow Bajuni campaigners, the successes of the asylum cases were closely related to the testing of their linguistic and cultural heritage. The success of their cases rested on their ability to prove their place of origin (the Bajuni territories), their nationality (Somali) and their ethnicity (Bajuni). In the absence of documentation, the UK Home Office instead required that they fulfil the requirements set out in CG [2004] UKIAT 00271⁸², an immigration test-case for establishing Bajuni identity. The requirements explicitly target aspects of the Bajuni peoples' linguistic and cultural heritage. It states:

What is needed therefore in cases in which claims to be Somali nationals and Bajuni clan identity are made is first of all: [...]

(a) knowledge of Kibajuni;

(b) knowledge of Somali depending on the person's personal history;

⁸² IAT 2004

(c) knowledge of matters to do with life in Somali for Bajuni (geography, customs, occupations etc.).⁸³

Based on these requirements, the campaigners initially completed a series of language tests, both through professional language-testing companies, and in immigration court. However, both the testing procedures themselves and the interpretation of their results by UK immigration authorities soon proved problematic.

For instance, Nafiz was required to undergo formal LADO testing with a (then) government-approved testing company, Sprakab. Until 2014, Sprakab was a UK-government approved LADO-testing company that employed language ‘experts’ to evaluate through linguistic means the nationality of asylum seekers who had arrived in the UK without documentation.⁸⁴ The tests involved several components that evaluated the ‘level’ of their language (between ‘native level’ to ‘elementary level’), alongside their use of phonology and prosody, and their morphology and syntax for traces of linguistic habits specific to the area from which an asylum seeker said they came. The tests were meant to be conducted by a native speaker of the language in question, with ‘expert’ knowledge of the context from which the applicant came.⁸⁵ However, as the campaigners’ cases demonstrate, these standards were often not met, whilst the rigours of the linguistic testing rarely allowed for the ways in which the cultural and social upheaval in Somalia affected language habits.

Although Nafiz spoke Kibajuni in his interview, Sprakab concluded it was an insufficient percentage of Kibajuni to Swahili to ‘prove’ that Nafiz was Somali Bajuni. Allen

⁸³ IAT 2004

⁸⁴ Following a Supreme Court ruling in 2014 that cast doubt on its practices, Sprakab is no longer used by the UK government for LADO testing (Weldon 2014). The UK Government now conducts LADO testing through its own representatives.

⁸⁵ See Patrick (2014) for an in-depth explanation of Sprakab methods and their underpinning philosophy.

notes that information about the linguistic practices of Somali Bajuni people has been found to be out of date, based on evidence given by elders who left the islands in the 1980s.⁸⁶ In the meantime, life on the Bajuni islands has changed. Bajuni people have travelled further afield for trade and shelter, and their linguistic practices have broadened to include a greater portion of Swahili.⁸⁷ The changing linguistic practices of the Bajuni people are informed by adaptations to the Bajuni lifestyle and experiences over the last 30 years. The testing to which the Nafiz was subject relies on an idea of language as a fixed and predetermined category. As we argue in the literature review above, language, as other elements of intangible heritage, is subject to change - a characteristic enshrined in the provisions of the 2003 ICH convention.⁸⁸ Moreover, international documents such as the UN Committee on Economic, Social and Cultural Rights's (CESCR) General comment no. 21 recommends treating 'culture as a living process, historical, dynamic and evolving, with a past, a present and a future'⁸⁹. The elasticity of heritage, including linguistic heritage, thus has change at its core. By failing to take into account how Nafiz's language practice evolves, the language tests disregard the processual nature of Bajuni linguistic practice as intangible heritage but also its legitimacy, applying the framework that led to the earlier definitions of heritage as static and unchanged⁹⁰.

Since the beginning of its use by the UK Government in the early 2000s, LADO testing has attracted significant criticism. The case for LADO testing was initially made by a number of academic linguists and linguist specialists, which accepted that through an analysis of a combination of their mother tongue, accent and cultural knowledge of language-use, it is possible to gain an indication of a person's place of origin.⁹¹ However, whilst this scholarship

⁸⁶ Allen 2008, 2

⁸⁷ Nurse 2013, 9

⁸⁸ UNESCO 2003a, art. 2.1

⁸⁹ CESCR 2009, Art. 11

⁹⁰ Bortolloto 2007, Waterton 2010

⁹¹ Patrick 2014

suggests that LADO might be useful in providing an indication of a person's national/ethnic identity, it also stresses that results should not be treated as definitive. In addition, it recommends specific conditions in which the testing should be conducted, emphasising that testing should be led by a linguistic expert with both language and cultural knowledge-basis, and its conclusions should only be taken as guidance, not as fact.⁹² Unfortunately, as Nafiz's case above indicates, these caveats have been disregarded in practice.⁹³ In place of a nuanced approach to language-practice that treats linguistic ability as elastic and only a partial indicator of a person's place of origin, LADO testing has instead fallen foul both of bad testing practice,⁹⁴ and been (mis)shaped into a tool through which UK immigration authorities can make zero-sum decisions about the test results, their related asylum cases and the applicants themselves. Rather than taking an approach that sought to unravel the complexities of Nafiz's and the other Bajuni campaigners' backgrounds, UK immigration authorities instead began to use the tests to move towards a 'blood and soil'⁹⁵ logic that concluded that a person should speak in a particular way on account of their ethnicity. This essentialised notion of the relationship between ethnicity, linguistic practice and identity goes against the recommendations of the progenitors of LADO testing,⁹⁶ In Nafiz's case, this approach means that in court he is judged on the logic of how one speaks *is* who one is, which, due to the circumspect results of his LADO tests, indicates to the immigration judge that he is not Bajuni and therefore not eligible for asylum.

The approach the judge takes towards language also notably is contrary to the emphases of the 2003 ICH Convention, which argues for an understanding of (intangible) cultural heritage as practiced, elastic and changeable. Building on Nafiz's experiences, one might

⁹² Patrick 2014

⁹³ Amnesty International 2012

⁹⁴ Allen 2008, Allen 2013

⁹⁵ Stevens 1999

⁹⁶ Patrick 2014

therefore consider the relationship between the denial of his language, the denial of his asylum application and the UK's absence from the 2003 ICH Convention. Does the UK's absence from the Convention mean that Nafiz's flexible, elastic cultural heritage is unprotected? Does the UK's absence from the Convention therefore directly have an adverse effect on Nafiz's asylum application? And what of the status of language in this scenario? Given the current lack of provision for language in ICH instruments, to what extent would the UK's ratification of the 2003 Convention be of benefit to Nafiz's case? Taking the complexity of the Bajuni's situation into account, it is difficult to answer these questions with any certainty. However, they remain with us as we continue our discussion.

A question of 'evidence'?

In Nafiz's case, the judge's approach to the relationship between ICH and identity is damaging enough to result in a final judgement against his asylum claim; however, the consequences of this approach feature throughout his case rather than solely in the final ruling. It can also be found in the ways in which immigration authorities privilege certain types of 'evidence'. For instance, in Nafiz's case above, the judge relies upon 'country guidance' – a report containing information about Somalia, compiled from research conducted by academics and NGOs – to make judgements about the veracity of Nafiz's claims. However, despite the weight given by the immigration judge to the report, it is not without issue. In the context of Bajuni asylum cases, a number of scholars and NGOs have raised concerns about the information contained in 'country guidance' documents.⁹⁷ Despite these inadequacies, in Nafiz's case, the judge continues to use the report to draw conclusions about Nafiz's language-practices and ethnicity.

⁹⁷ Nurse 2003, Allen 2008, Allen 2013, Amnesty International 2012 have questioned the reports' information sources, the extent to which their information remains in date, and their treatment of language as a fixed category.

Similarly, despite well-versed complaints against language-testing practices, the judge also treats the test results as authoritative.

In the context of an asylum claim, it is not unreasonable for the judge to require evidence of a person's place of origin. However, in Nafiz's case above, the judge appears to give weight to the evidence and expertise to those with institutional – and specifically, state – connections (LADO testing is a government initiative; country guidance is compiled by the Home Office). In part, this may be because they appeal to a similar kind of logic that sees a person's ethnicity as fixed: LADO tests, for instance, might appear to offer an almost 'scientific' measure of a person's ethnicity and place of origin, whilst country guidance offers a closed and confident narrative of country-specific events that might be pertinent to a person's asylum application. In contrast, alternative forms of 'evidence' fair badly. For instance, campaigner Faraaq's case relied upon detailed testimony formed from memories of his life on the island. However, because his testimony was emotive and based on individual experiences, it was considered unreliable. In similar circumstances, campaigner Mohamed, had his linguistic testimony dismissed by an immigration judge on the basis of a LADO test. In reaction, and out of desperation, he decided to give his evidence to the judge in Kibajuni. With no other option open to him, he hoped that the living, speaking example of his linguistic ability will present sufficient 'evidence' to the judge of his Somali Bajuni ethnicity. However, in a somewhat risible display of ethnic and linguistic inhospitality,⁹⁸ the Judge responded:

The appellant said that he was speaking in Kibajuni when he gave evidence before me. I found that to be an unsatisfactory way to proceed. As a Scotsman I can hardly

⁹⁸ Hill 2015

know what language was being spoken. The appellant did not provide any expert report which could have assisted me.⁹⁹

In a court setting, a lack of supporting, corroborating evidence to Faaruq's or Mohamed's claims will of course be considered problematic. But here, it is not only that they fail to satisfy a burden of proof but that they try to do so with evidence that the judge – and the immigration system – does not consider to be evidence. For instance, in Mohamed's attempt to give evidence of his linguistic and cultural heritage, the judge dismisses his submission because the *type* of evidence - a performance of living, linguistic heritage - does not correspond with the terms of evidence to which the immigration system is calibrated. In Faaruq's case, his experience of Bajuni cultural heritage is doubted because it relies upon memory, local knowledge and storytelling.

In both cases above, the type of evidence that the Bajuni campaigners seek to provide – and the way in which they attempt to provide it – is closely related to the performance of their intangible cultural heritages. However, because this 'evidence' is informed by feature the type of qualities frequently associated with ICH – individual experience, embodied performance, changeable parameters – it does not fit within the immigration court's definition of 'evidence' and is thus not seen as 'evidence' at all. This has serious consequences for the Bajuni campaigners because though, drawing on their ICH practices, they are able to provide a wealth of information about their lives as Bajuni people, the information they give is not considered to be of relevance to their cases – and in some instances, is detrimental to their success. There is an issue here not only of framing – but also of episteme, of what is considered knowledge and what is not.

⁹⁹ Private correspondence

The judge's scepticism of the type of evidence the Bajuni campaigners provide is perhaps indicative of a broader scepticism in the UK towards matters of Intangible Cultural Heritage. Again, here it is not possible to establish causality – that is, we cannot say that the judge's scepticism is the *result* of the UK state's approach to ICH – however, it is not improbable that attitudes institutionalised in one faction of the state have influence on other factions. Consequently, we might suggest that dominant government attitudes towards ICH-specific protections have influence on other areas of statecraft, including the administration of the state's borders. Not bound by the ICH Convention – and without alternative, robust ICH-specific provisions – current UK 'authorised discourses'¹⁰⁰ encourage the judge to treat the Bajuni campaigners' cases according to rather fixed and inflexible definitions of cultural expression – an approach that fails to respond to the nuance of the campaigners' cases, and for which the campaigners suffer.

A question of 'expertise'?

Inevitably, the way in which the UK immigration system questions the authority of the Bajuni campaigners' 'evidence' led to a questioning of the authority of the Bajuni campaigners themselves. In the examples above, as different immigration officers and judges cast doubt over both the Bajuni campaigners' evidence and nationality, their objections support and return to the question of 'expert' knowledge. Though the judge cannot be expected to have a working knowledge of Kibajuni, his treatment of Mohamed's Kibajuni performance is dismissive from the outset. Rather than simply reprimanding Mohamed, the judge might have instead sought to explore the circumstances that prompted Mohamed's linguistic performance. Instead, startled by the absence of an 'expert' witness or report – and in part because of this absence – the judge rebukes Mohamed. Meanwhile, despite Faaruq's wealth of experience of the Bajuni's

¹⁰⁰ Smith 2006

cultural heritage, his knowledge is dismissed because it is not set out in the empirical terms of an 'expert'. Similarly, despite Nafiz's multilingual ability in Kibajuni and Swahili, his case is dismissed on the account of 'expert' testers. In their blog, the campaigners write,

Speaking about Bajunis and Kibajuni, [the authorities] call themselves as language experts but they know nothing about the language or tradition and culture of Bajunis. [...] I don't think I can call myself an expert in front of someone who was born and grew up with the language or culture that I only learn from different books or through internet.¹⁰¹

In all of the Bajuni campaigners' asylum cases, the immigration authorities continually give precedence to the evidence and expertise of those with institutional weighting and those already sponsored by the state. Their ICH practices are only accepted as 'evidence' in their cases when they are seen to cohere to state frameworks – i.e. only when they are defined by, tested against and analysed in the terms of the state-sponsored 'experts'. In many eventualities – and as is evident in the cases above – even if elements of ICH are accepted as 'evidence', it continues to be found wanting in the context of asylum law.

For instance, Logan has noted that ratification of the ICH Convention can be detrimental to minority groups and communities because it means that the state can either prioritise one group over another, or prioritise a dominant community over a minority group. He writes, 'governments are responsible for the official lists and they generally define the official heritage to reflect what the dominant socio-political group or groups in a particular jurisdiction think is significant'.¹⁰² Our comments in this paper have so far suggested that the

¹⁰¹ Bajuni Campaign 2014; May 21st 2014

¹⁰² Logan 2012, 236

Bajuni campaigners' cases have suffered from the UK's absence in the ICH Convention. However, in the context of the Bajuni campaigners' experience of narrative hierarchy, and with Logan's comments in mind, might we reconsider? Has the UK's absence from the Convention meant that the campaigners's cases have not been subject to the hierarchies of heritage that are endemic in the ratification of the Convention?

Unfortunately, this does not seem to be the case. The emphasis that the UK immigration system places on certain types of 'expertise' implies a hierarchy of authority and knowledge which sees the Bajuni campaigners' knowledge of their own ICH left with little purchase. As we have discussed, this is not an unusual occurrence; rather, the state has a history of occupying a similar position of power when it comes to defining heritage.¹⁰³ Indeed, the Bajuni campaigners' cases appear to have been inserted into a hierarchy of heritage and expertise, even without framework of the 2003 ICH Convention. We find two possible explanations for this situation: 1) in contradiction to Logan's comments above, that this has occurred *because* the UK is not party to the ICH Convention, which would perhaps encourage the state to consider further cultural heritage provisions for minority groups and communities or 2) that this is indicative of broader institutional attitudes towards the expression of minority groups and communities and is likely to occur regardless of the UK's positioning on the 2003 ICH Convention. In this context, being in a state that has *not* ratified the Convention has not helped the Bajuni... however, taking into account the current limitations of the 2003 ICH Convention, this is not to say that a converse situation – in which the UK had ratified the Convention – would present better circumstances for the campaigners. This especially remains the case for the Bajuni whilst language remains unaccounted for in ICH provision.

¹⁰³ Shaheed 2011, Harvey 2015, Harrison 2013

Conclusion

The Glasgow Bajuni campaigners' cases expose shortcomings in (1) contemporary approaches to ICH by the UK Immigration authorities, and in (2) the current provisions of the 2003 ICH Convention. Firstly, the campaigners' cases show that the lack of recognition given by the UK Government to the need for ICH-specific provision has influence and impact beyond matters that overtly relate to heritage. Instead, as the campaigners' cases show, the emphasis of the UK Government's dominant and 'authorised discourse' on fixed and tangible heritage extends into other factions of statehood – including the immigration system – and allow for state representatives – including immigration judges – to advance state-supported scepticism over matters relating to ICH. Whilst this may appear to be an indirect consequence of the UK's stance on ICH, in the context of the immigration system, in which this approach has the potential to grant or withhold asylum, matters become intensely politicised. In the Glasgow Bajuni campaigners' cases, the ideologies involved in establishing the limits of the UK state's 'authorised' heritage discourse soon become closely related to establishing the limits of the UK state. In this situation, definitions and determinations of heritage must be seen in the state's vested interest in border maintenance and control.

Secondly, that in its current form the 2003 ICH Convention at best offers uncertain protection for groups such as the Glasgow Bajuni. There is certainly a case to be made that argues that if the UK were party to the ICH Convention, the cultural heritage rights of the Glasgow Bajuni might enjoy more robust protection. Ratification of the Convention might oblige other state actors (such as the Immigration authorities) to consider the links between cultural heritage and human rights in ways they currently do not. It also might set a more general tone that might encourage state actors to consider matters of ICH without state-supported scepticism. However, there is also a case to be made that the 2003 ICH Convention offers the Glasgow Bajuni campaigners little additional protection. The issue here is in the

emphasis the Convention places upon the role of the state to identify and nominate instances of ICH on behalf of communities and groups.¹⁰⁴ This means, as Harrison observes, that communities and groups continue to be subordinated to the priorities of the state: ‘groups are subsumed within nation-states and representations of their culture employed within broader nationalist discourses’¹⁰⁵. If the state continues to dominate representations of ICH, the experiences, concerns and rights of minority groups and communities are likely to at best become occluded by state concerns. This especially applies to migrant and asylum-seeking groups, which are regularly the subjects of discourses about the limits of the nation.¹⁰⁶ Moreover, at the margins of the state, and marginalised in state interests, asylum seeking groups have minimal access to rights and state provision.¹⁰⁷ We would suggest that the 2003 ICH Convention makes little provision for this type of dynamic.

These observations leave us with something of a conundrum. Whilst the Glasgow Bajuni campaigner’s cases have certainly not been helped by the UK’s absence from the 2003 ICH Convention, we would also question the extent to which they would benefit if the UK ratified the provision in its current form. For the Bajuni campaigners, this offers little relief from an already grim situation. At the time of writing, though the Bajuni campaigners continue to dispute both the refusal of their asylum cases and the grounds on which they were refused, they could not see how their cases might further be resolved. In a broader context, their cases prompts an urgent reconsideration of the provisions made by the 2003 ICH Convention, and asks, are there any circumstances under which it might be of future use to cases like that of the campaigners? The recent success of the OAS Declaration on the Rights of Indigenous

¹⁰⁴ Kuutma 2013

¹⁰⁵ Harrison 2013, 136

¹⁰⁶ Hill 2016

¹⁰⁷ Hynes 2011

Peoples¹⁰⁸ may provide some guidance. Developed with the close involvement of indigenous peoples, it enshrines their rights to self-determination, multiculturalism, multilingualism and to ‘maintain, express and develop their cultural identity’.¹⁰⁹ The declaration is a rare instance in cultural heritage instruments in which the autonomy and self-definition of the peoples involved are foregrounded above the role of the state. Future developments of the 2003 ICH Convention might therefore look to the Declaration’s emphasis on self-determination, cultural expression and state-minimisation to address parallel gaps and limitations. We would also seek to push the implications of the Declaration a little further. The political and historical context that necessitates this Declaration is very different to that facing asylum seeking people in the UK. Remaining mindful of these differences, but recognising the potential of the Declaration’s precedent, we would therefore ask: to what extent might it be possible to develop a similar instrument that makes provision for the cultural heritage rights of asylum seekers? And how might we better protect and support the intangible cultural heritage for those at the margins of the state?

¹⁰⁸ OAS 2016

¹⁰⁹ OAS 2017

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